Shahidan bin Shafie v Atlan Holdings Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–633 OF 2004
HAMID SULTAN J
5 JULY 2012

Companies and Corporations — Shares — Acquisition of shares — Danaharta offered 45% shares in ailing company for sale by tender — Defendants successfully purchased 32% of shares and proposed schemes to revitalise company — Whether defendants and Danaharta 'acted in concert' to take over control of company — Whether defendants legally obliged to make mandatory take-over offer to all shareholders of company — Whether Securities Commission Act 1993 and Take-over Code allowed minority shareholders private law remedy for statutory breach

The plaintiff was a minority shareholder in Naluri Bhd ('Naluri'), a public company. Pengurusan Danaharta Nasional Berhad ('Danaharta'), a special purpose vehicle formed under the Pengurusan Danaharta Nasional Bhd Act 1998, owned 44.84% of the issued and paid-up capital of Naluri through a vesting order. Special Administrators ('SAs') appointed over Naluri decided it was in the best interests of stakeholders of Naluri for it to proceed with a capital repayment exercise. Naluri was also notified by the Kuala Lumpur Stock Exchange that its level of operations was inadequate and not in accordance with Listing Requirements. Danaharta advertised the sale by tender of a 44.84% block of shares in Naluri. The second defendant, a subsidiary of the first defendant, after successfully bidding for 32% of Naluri's shares, submitted to Danaharta proposals to involve Naluri in certain asset acquisition and investment schemes to revitalise the company. The proposals were approved, among others, by the Securities Commission ('SC') and the shareholders of the parties involved. The SC had not required the first defendant to make any mandatory take-over offer to the shareholders of Naluri. In the instant suit, the plaintiff claimed that the defendants had acted in concert with Danaharta to control Naluri by owning between them 44% of Naluri's shareholding and controlling more than 33% of the voting shares in the company. Consequently, the plaintiff said that pursuant to s 33(B) of the Securities Commission Act 1993 ('SCA') and Practice Note 2.4 issued by the SC, the defendants were obliged to make a mandatory take-over offer to all shareholders of Naluri, excluding Danaharta, in accordance with the SCA and the Take-over Code. The plaintiff had in a separate action ('the OS action') sought to declare the

second defendant's acquisition of the Naluri shares null and void but the action was dismissed.

Held, dismissing the claim with costs:

(1) The plaintiff's evidence on the role of Danaharta 'acting in concert' was based on speculation, surmise, conjecture and hearsay. Danaharta came into possession of 44% shares in Naluri as a consequence of vesting. Danaharta and the SAs had no personal interest in the subject-matter of the shares. 'Acting in concert' had a specific meaning under s 33(2) of the SCA and by no stretch of the imagination did Danaharta's or the SAs' presence or conduct trigger s 33(2) (see paras 9–11).

(2) The plaintiff's evidence did not provide a cause of action and had to be dismissed in limine as Danaharta was a special purpose vehicle with rights and immunities and could not be a subject-matter of speculative attack by the plaintiff in law or fact (see para 12).

(3) The SCA and the Take-over Code allowed the SC to jealously guard and regulate the players without providing any form of private law remedy to minority shareholders. Sections 33A(4) and (5) and 33D(1)(a) to (g), (2) and (3) placed the entire control with the SC to do what was just and equitable inclusive of condoning any breach according to the exigencies of the case (see para 13(e)).

(4) The plaintiff should have lodged a complaint with the SC for any purported breach even before pursuing any claim, whether it was for a public or private law remedy. The court ought not to entertain any application where the complaint had not been placed with the appropriate authority as it would amount to abuse of process of court when a mechanism for complaint and relief had been specifically provided for in the Act (see para 13(f)).

(5) The plaintiff could have raised the present issues in the OS action rather than raising them on instalment basis in one suit after another. Such conduct was an abuse of process of court (see para 13(g)).

[Bahasa Malaysia summary

Plaintif merupakan pemegang saham minoriti Naluri Bhd ('Naluri'), sebuah syarikat awam. Pengurusan Danaharta Nasional Berhad ('Danaharta'), perantaraan khas yang ditubuhkan di bawah Akta Pengurusan Danaharta Nasional Bhd 1998, memiliki 44.84% modal yang dikeluarkan dan berbayar Naluri melalui perintah perletakhakkan. Pentadbir-pentadbir khas ('PK') yang dilantik ke atas Naluri membuat keputusan bahawa adalah untuk faedah terbaik untuk pemegang amanah Naluri untuk ia meneruskan perlaksanaan pembayaran semula modal. Naluri juga telah dimaklumkan oleh Bursa Saham Kuala Lumpur bahawa tahap operasinya adalah tidak mencukupi dan tidak

menurut Keperluan Penyeneraian Danaharta telah mengiklankan jualan melalui Danaharta melibatkan Naluri dengan pemerolehan aset dan skim pelaburan tertentu untuk membangunkan semula syarikat tersebut. Cadangan tersebut diluluskan, antara lain, oleh Suruhanjaya Sekuriti ('SS') dan pemegang-pemegang saham pihak yang terlibat. SP tidak memerlukan defendan pertama untuk membuat apa-apa tawaran mengambil alih mandatori kepada pemegang-pemegang saham Naluri. Dalam kes ini, plaintif mendakwa bahawa defendan-defendan telah bertindak bersama-sama dengan Danaharta untuk mengawal Naluri dengan memiliki antara mereka 44% pegangan saham Naluri dan mengawal lebih daripada 33% saham-saham mengundi dalam syarikat tersebut. Selanjutnya, plaintif mengatakan bahawa menurut s 33B Akta Suruhanjaya Sekuriti 1993 ('ASS') dan Nota Amalan 2.4 yang dikeluarkan oleh SS. Defendan-defendan wajib untuk membuat tawaran take-over mandatori kepada kesemua pemegang saham Naluri, kecuali Danaharta, menurut ASS dan Take-Over Code. Plaintif telah dalam dua tindakan yang berbeza ('tindakan SP') memohon untuk mengisytiharkan pemerolehan saham-saham Naluri oleh defendan kedua adalah terbatal dan tidak sah tetapi tindakan itu telah diketepikan.

Diputuskan, menolak tuntutan dengan kos:

(1) Keterangan plaintif ke atas peranan Danaharta 'acting in concert' adalah berdasarkan spekulasi, tekaan dan katadengar. Danaharta mendapat pemerolehan 44% saham dalam Naluri disebabkan oleh perletakhakkan. Danaharta dan PK-PK tidak mempunyai faedah tersendiri dalam perkara subjek saham-saham tersebut. 'Acting in concert' mempunyai maksud terperinci di bawah s 33(2) ASS dan bukan disebabkan imaginasi bahawa kehadiran atau tindakan Danaharta atau PK-PK yang mencetuskan s 33(2) (lihat perenggan 9–11).

(2) Keterangan plaintif tidak memberikan kausa tindakan dan terpaksa ditolak *in limine* memandangkan Danaharta merupakan perantaraan khas yang mempunyai hak-hak dan kekebalan dan tidak boleh menjadi sasaran spekulasi perkara subjek oleh plaintif dari segi undang-undang atau fakta (lihat perenggan 12).

(3) ASS dan Take-over Code membenarkan SS untuk menjaga dan mengawal selia pemegang-pemegang saham tanpa memberikan apa-apa bentuk remedi undang-undang persendirian kepada pemegang-pemegang saham minoriti. Seksyen 33A(4) dan (5) dan 33D(1)(a) ke (g), (2) dan (3) memberikan kawalan sepenuhnya kepada SS untuk melakukan apa yang adil dan berekuit termasuk membiarkan apa-apa percanggahan mengikut keterdesakan kes (lihat perenggan 13(e)).

(4) Plaintif seharusnya membuat aduan dengan SS untuk sebarang percanggahan yang dikatakan sebelum memulakan sebarang tuntutan,

sama ada untuk remedi undang-undang awam atau persendirian. Mahkamah sepatutnya tidak menghiraukan apa-apa permohonan di mana aduan tidak ditempatkan dengan pihak berkuasa bersesuaian memandangkan ia akan membawa kepada penyalahgunaan proses mahkamah apabila mekanisma untuk aduan dan relief telah dengan terperinci diperuntukkan oleh Akta (lihat perenggan 13(f)).

(5) Plaintif boleh membangkitkan isu-isu ini di dalam tindakan SP daripada membangkitkannya pada asas ansuran dalam satu guaman selepas lagi satu guaman. Tindakan itu adalah penyalahgunaan proses mahkamah (lihat perenggan 13(g)).]

Notes

For cases on aquisition of shares, 3(1) *Mallal's Digest* (4th Ed, 2011) paras 910–912.

Cases referred to

Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor [2003] 6 MLJ 49, HC (refd)
Ex Parte Island Records Ltd & Ors [1978] Ch 122, CA (refd)
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657, SC (refd)
Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corporation Bhd & Ors [2012] 7 MLJ 215; [2012] 4 CLJ 401, HC (refd)
X (minors) v Bedfordshire Country Council [1995] 3 WLR 152, HL (refd)

Legislation referred to

Companies Act 1965 s 67(1)
Malaysia Code on Take Overs and Merger 2010 Practice Note 2.4
Pengurusan Danaharta Nasional Berhad Act 1998
Rules of the High Court 1980 O 15
Securities Commission Act 1993 ss 33(1), (4), 33(2), 33(B), 33A(4), (5), 33D(1)(a), (b), (c), (d), (e), (f), (g), (2), (3)

Lim Kian Leong (Cheah Kit Yee and Lui Kar Yee with him) (Lim Kian Leong & Co) for the plaintiff.
Kirubakaran (S Malar with him) (Kiru & Yong) for the first defendant.
Joseph Yeo (Joseph Yeo) for the second defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiff's action in the capacity of a shareholder of Naluri Bhd, in essence, seeking an order against the defendants to make a mandatory offer to all shareholders of Naluri (except Danaharta) in accordance with the Securities Commission Act 1993 ('SCA') and Take-over Code ('Code') and damages. The prayers read as follows:

Wherefore the Plaintiff prays against the 1st and 2nd Defendants jointly and severally for the following Orders and relief, namely:

(a) an Order that the 1st and 2nd Defendants jointly and severally do make a Mandatory Take-Over Offer to all shareholders of Naluri (except Danaharta) at an offer price of RM1.98 per ordinary share in accordance with the terms of the Securities Commission Act 1993 and the Take-over Code;

(b) Damages to be assessed;

(c) Interest at the rate of 8% per annum on the offer price of RM1.98 per share and/or the damages to be assessed as the case may be from the date of filing this Writ to the date of payment;

(d) Costs;

(e) Such further and other relief as this Honourable Court may deem fit.

[2] What is essential to note in this case is that: (i) the plaintiff has not made any complaint to the Securities Commission for the purported breach of the Code; (ii) the Securities Commission has not raised any issue or taken any action against the defendants; (iii) the Securities Commission is not made a party or the plaintiff is not seeking any order of court or directions against the Securities Commission; (iv) the plaintiff's complaint of acting in concert is related to Danaharta which is a special vehicle formed under the Pengurusan Danaharta Nasional Berhad Act 1998 ('Act 1998') with particular scope and object etc; (v) Danaharta being a special purpose vehicle cannot per se be envisaged to be a party acting in concert pursuant to SCA and Practice Note 2.4 of the Code; (vi) the plaintiff is asserting that it has a private law remedy in respect of statutory breach and right to damages in reliance on the Supreme Court decision in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657, which is a decision premised on administrative law and no mention was made in respect of damages; (vii) the other case of *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49 relied on by the plaintiff relates to administrative law and is not of much help on the factual matrix of the instant case; (viii) the instant case is not one where the defendant had acquired 33% of Naluri per se, but the plaintiff is speculating by circuitous argument that the defendants have actually obtained control of Naluri Bhd; (x) the plaintiff is not seeking a relief against a statutory body but against the defendants who are subject to the control of Securities Commission which has ample provision in law to take comprehensive action against wrongdoers unlike the previous provisions where such comprehensive relief was not provided for when the Supreme Court had to deal with related issues in *Petaling Tin Bhd*; (xi) to compound the problem, Naluri Bhd has been de-listed and in consequence, the issue of mandatory offer may be academic; (xii) whether the Securities Commission is a necessary and interested party and/or its presence may be necessary pursuant to O 15 of the RHC 1980 to deal with issues in

hand need also to be considered in the right perspective; (xiii) the plaintiff had also filed an originating summons in Suit No D7–4–94 of 2004 (OS action) which has nexus to the complaint and is now a subject matter of appeal to the Court of Appeal; and (xiv) whether filing of this action when all related issues and complaint can be dealt with in one suit needs to be dealt with.

[3] It must also be noted that the issue whether private law remedy is available for statutory breach is a matter of construction of the statute to determine the legislative intent, and is not a right per se known to common law. There are a number of cases which had dealt with similar issues. In *X (minors) v Bedfordshire Country Council* [1995] 3 WLR 152 Lord Browne-Wilkinson sitting in the House of Lords had this to say:

> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that, in the ordinary case, a breach of statutory duty does not, by itself give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action, since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty, that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544; [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456; [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that, on the true construction of the statute, the protected class was intended by Parliament to have a private remedy. Thus, the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v Lord Wimborne* [1898] 2 QB 402.
>
> Although the question is one of statutory construction, and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals, but for the benefit of society in general. Thus, legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, ie

bookmakers and prisoners: see *Cutler v Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544; [1949] AC 398; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1991] 3 All ER 733; [1992] 1 AC 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

[4] The cases parties have relied on are set out in the annexure to the judgment.

BRIEF FACTS

[5] The summary of the plaintiff's case and the summary of the defendants' case have been set out in encls 125, at pp110–111 respectively. Much judicial time will be saved if the said enclosures are set out in full.

[6] Enclosure 125, the summary of the plaintiff's case can be summarised as follows:

(a) the plaintiff has filed the present action, in his capacity as a shareholder of Naluri Bhd, for an order, inter alia, that the defendants jointly and severally do make a mandatory take-over offer to all shareholders of Naluri Bhd (except Danaharta) at an offer price of RM1.98 per ordinary share in accordance with the terms of the SCA, the Code and damages. The fact that the plaintiff is a shareholder of Naluri Bhd has been admitted by the defendants;

(b) the plaintiff had on 2 April 2004 filed the OS action seeking, inter alia, a declaration that the proposed acquisition of the Naluri Bhd's shares by the second defendant vide an agreement dated 11 August 2003 (the Proposed Naluri Shares SPA) was in breach of s 67(1) of the Companies Act 1965 and was therefore void for illegality. The court dismissed the OS action with costs on 26 April 2004 and the plaintiff has filed an appeal to the Court of Appeal on 28 April 2004;

(c) the defendants have on or about 9 October 2004 completed the Proposed Naluri Shares SPA and appointed or caused their nominees to be appointed as directors of Naluri Bhd. The suit therefore is proceeding on the basis that the defendants have, as a matter of fact, acquired 220,965,222 ordinary shares of RM1 each in Naluri Bhd (ie 32% of the issued and paid up capital of Naluri Bhd).

The facts leading to the filing of the suit

(d) Naluri Bhd is a public company with an issued and paid up capital of RM690,516,320 divided into 690,516,320 ordinary shares of RM1 each;

(e) the rights, title and interest in relation to 309,648,000 fully paid ordinary shares of RM1 each in Naluri Bhd have been vested in Pengurusan Danaharta Nasional Bhd, Danaharta Urus Sdn Bhd and Danaharta Managers Sdn Bhd ('Danaharta');

(f) under the terms of the Naluri Shares SPA, the second defendant, a subsidiary of the first defendant, has agreed to acquire from Danaharta 220,965,222 fully paid ordinary shares of RM1 each in Naluri Bhd amounting to 32% of the issued share capital of Naluri Bhd for a total cash consideration of RM437,511,139 at RM1.98 per share;

(g) on 23 December 2002, special administrators ('SA') were appointed over Naluri Bhd in accordance with the Pengurusan Danaharta Nasional Bhd Act 1998 to act on behalf of Danaharta;

(h) the special administrators of Naluri Bhd have entered into a series of transactions known as the 'Proposed SHB Property Acquisition', the 'Proposed SHB Investment' and the 'Proposed UI Group Acquisition' for a total cost of RM437,380,000 (Naluri Scheme);

(i) in the announcement to the MSEB made on 13 December 2003, the special administrators of Naluri Bhd explained the rationale for the Naluri Scheme as follows:

> …The Proposed SHB Investment will provide Naluri with immediate access to SHB's established business of wholesaling, distribution and retailing of duty free and non-dutiable merchandise…
>
> …The Proposed UI Group Acquisition will provide Naluri access to UI Group's established business of automotive component manufacturing.

(j) Naluri Bhd is principally an investment holding company involved in ownership of landed properties and hotels and aviation services and parts. The Naluri Scheme will therefore result in a 'significant change in business direction or policy of the company' pursuant to Practice Note 2.4(c) issued by the Securities Commission;

(k) on 13 December 2003, the special administrators announced that on 12 December 2003 the SAs had entered into a letter of intent with the second defendant under the terms of which the special administrators agreed that upon the second defendant becoming registered as a substantial shareholder of Naluri Bhd, the special administrators 'shall procure the appointment of additional directors as nominated by Atlan (the second defendant) to reflect the substantial equity interest in Naluri Bhd';

(l) the first defendant confirmed the aforesaid agreement of the special administrators to appoint nominee directors of the second defendant to the board of Naluri Bhd in an announcement by the first defendant to the MSEB on 13 December 2003;

(m) Danaharta together with the second defendant upon its completion of the Naluri Shares SPA would altogether own a total of 44% of the shareholding of Naluri Bhd. They would therefore jointly control over 33% of the voting shares of Naluri Bhd;

(n) in an announcement to the MSEB dated 23 May 2003, the first defendant explained the rationale for the initial proposals submitted to Danaharta and stated:

> Upon completion of the Proposed Naluri Shares Acquisition and Naluri Proposals, AHB shall through APSB become the single largest shareholder of Newco [a Newco initially intended to take over the assets and listing status of Naluri], holding a 32% equity interest …
>
> … Newco shall in turn, have a controlling interest in SHB (Sriwani Holdings Bhd). This shall allow AHB to effectively control the public listed companies.

(o) in an announcement to the MSEB dated 13 December 2003, the first defendant explained the rationale for the revised proposals submitted as follows:

> Upon completion of the Proposed Naluri Shares Acquisition, APSB (the 2nd defendant) will become the single largest shareholder of Naluri…
>
> …Pursuant to the Proposed SHB Investment Naluri shall have a controlling interest in SHB (Sriwani Holdings Bhd).
>
> This shall allow AHB [the 1st defendant] to effectively control 2 public listed companies…

(p) in an interview published in the Malay Mail on 1 July 2003, Datuk George Lim, the chairman of the first defendant is quoted as saying:

> …We will run Naluri professionally and with transparency…

(q) the transactions with SHB pursuant to the defendants' proposal for Naluri Bhd which the special administrators and Danaharta had approved were not at arms' length, they were related party transactions;

(r) further evidence will be brought in the course of the trial to show that the defendants were deeply involved in structuring the Naluri Share Sale, inter alia:

(i) Danaharta owned a block of Naluri shares comprising 44% of the total shareholding of Naluri Bhd. In response to an offer to bid conducted by Danaharta, the second defendant submitted an offer to purchase Naluri shares comprising 32% of the total shareholding of Naluri Bhd on 23 May 2003. In the public announcement made by the first defendant on 23 May 2003, it was stated, inter alia, that 'As part of the proposed Naluri Shares Acquisition, APSB has also

submitted to Danaharta together with the tender bid a proposal to expand the existing investment property and service apartment business of Naluri. The proposal is divided into two stages, namely, Stage I and Stage II as further detailed below';

(ii) the defendants' proposal submitted to Danaharta on 23 May 2003 included the acquisition by the second defendant of SHB. Under 'Rationale for the Proposed Naluri Shares Acquisition' it was stated that:'With the Proposed Assets Acquisition and Proposed Investment in SHB, Newco shall, in turn, have a controlling interest in SHB. This shall allow AHB to effectively control two public listed companies…'; and

(iii) apart from the appointment of directors, the letter of intent also provided that the defendants would use their best endeavours to ensure that all parties enter into the agreements relevant to the Naluri restructure (indicating that the defendants have a relationship with SHB and UIG), and that the defendants would pay all the special administrators' costs, including a RM1,000,000 advance;

(s) the above facts put to rest any claims by the defendants' that they were not involved in the SHB and Naluri transactions and that they were structured and carried out by the special administrators of Naluri Bhd;

(t) from the aforesaid announcements and newspaper article it is plain and obvious that the first defendant, through the second defendant, will, through the Naluri Scheme obtain 'control' of Naluri Bhd;

(u) the defendants have indeed acquired control of Naluri Bhd by acquiring 220,965,222 ordinary shares of RM1 each amounting to 32% of the issued and paid up capital and by appointing six out of the ten directors of Naluri Bhd (including the executive chairman and two executive directors) within 12 calendar months of completing the purchase as envisaged by the plaintiff. This was confirmed by the defendants themselves in public announcements and/or press statements issued by the respective parties;

(v) in resisting an application for summary judgment filed by the plaintiff previously, the defendants have at that material times referred to a copy of a letter dated 20 August 2004 from the Securities Commission to the second defendant and a copy of a letter dated 2 September 2004 from the second defendant to the Securities Commission signed by one Lee Sze Siang (who is now an executive director of Naluri Bhd) which specifically addressed the issue of acting in concert and the application of Practice Note 2.4. The second defendant expressly informed the Securities Commission that Practice Note 2.4 was of no application as no new directors were appointed at that material time;

(w) with the appointment of the new directors and the completion of the Naluri Shares SPA, it is clear that the defendants' argument that Practice Note 2.4 has not been triggered is not sustainable. It would therefore be incumbent upon the defendants to inform the Securities Commission of the direct application of Practice Note 2.4. However, no such thing appears to have been done by the defendants till date;

(x) Practice Note 2.4 has in fact been triggered and hence there is a mandatory obligation on the part of the defendants to make a mandatory take-over offer in accordance with the provisions of the Take-over Code and/or any other applicable laws; and

(y) it is plain and obvious:

(i) that the second defendant is clearly the 'agent' of the first defendant under the definition of 'acquirer' in s 33(1) of the SCA 1993;

(ii) that the defendants are persons 'acting in concert' with Danaharta for the purpose of enabling the defendants as 'acquirer' to have control of Naluri Bhd under s 33(1)–(4) of the SCA 1993;

(iii) that based on the facts and under s 33A of the SCA 1993 and Practice Note 2.4 of the Code, the defendants indeed obtained control of Naluri Bhd upon completion of the Naluri Shares SPA and the Naluri Scheme; and

(iv) that upon the execution or at the very latest upon completion of the Naluri Shares SPA, the defendants have therefore incurred an obligation under s 33(B) of the SCA 1993 to make a mandatory take-over offer in accordance with the provisions of the Take-over Code and Practice Note 2.4 issued by the Securities Commission.

[7] Enclosure 110, the summary of the first defendant's case reads as follows:

(a) the first defendant is a public company listed on the Malaysia Securities Exchange Bhd;

(b) the plaintiff having elected to proceed with the OS action that the Proposed Naluri shares SPA is void for illegality, is estopped from proceeding in this suit on the basis that the Proposed Naluri Shares SPA is valid and seeking an order that the first and second defendants jointly and severally make a mandatory take-over offer to the plaintiff. Further or in the alternative, the plaintiff is precluded and/or barred from instituting this second action when he had the opportunity to raise all these matters in the OS action;

(c) Pengurusan Danaharta Nasional Bhd was the owner of 44.84% of the issued and paid up capital of Naluri Bhd. On 23 December 2002 special administrators were appointed over Naluri Bhd;

(d) on 18 April 2003, Naluri Bhd announced that special administrators had decided that it was in the best interest of all stakeholders of Naluri Bhd for it to proceed with a capital repayment of at least RM690,516,320 on the basis of RM1 for each existing share;

(e) on 18 April 2003, Naluri Bhd had also received a notice from the KLSE informing that it was determined as having an inadequate level of operations in accordance with Practice Note No 10/2001 of the KLSE listing requirements. On 21 April 2003, Danaharta advertised for the sale by tender of the 44.84% block of share in Naluri Bhd;

(f) the terms of reference for the sale by tender included the following terms:

(i) interested parties are invited to submit offers to acquire a block of shares representing approximately 44.84% of the issued and paid up capital of Naluri Bhd based on its existing share capital (excluding conversion of any warrants issued by Naluri Bhd and which remain outstanding). The shares currently consist of 309,648,000 ordinary shares of RM1 each in the company. The principal terms and conditions of the sale by tender are contained in terms of reference available from Danaharta;

(ii) on 18 April 2003 Naluri Bhd announced that:

(a) the special administrators have decided that it is in the best interest of all stakeholders of Naluri Bhd for it to proceed with a capital repayment (proposed capital repayment) of at least RM690,516,320 on the basis of RM1 for each existing share in Naluri Bhd; and

(b) Naluri Bhd has received a notice from the KLSE informing that it is determined as having an inadequate level of operations in accordance with Practice Note No 10/2011 of the KLSE listing requirements.

(iii) a prospective bidder should consider the possible effects of the proposed capital repayment on the share capital of Naluri Bhd (including but not limited to any bonus or other share issue or consolidating, share split, conversion or cancellation of shares) as well as the effects of any conversion of existing warrants issued by Naluri Bhd. Based on Naluri Bhd's unaudited financial statements for the year ended 31 December 2002 announced on 28 February 2003, Naluri Bhd has 138,078,312 outstanding warrants; and

(iv) a prospective bidder should also consider the consequences of the KLSE's classification of Naluri Bhd as an affected listed issuer under Practice Note No 10/2011. Under Practice Note No 10/2011, the KLSE may suspend trading in shares of Naluri Bhd and subsequently de-list the shares of Naluri Bhd from the KLSE if it

fails to comply with its obligations prescribed in Practice Note No 10/2011. Given that the successful bidder would be a substantial shareholder of Naluri Bhd, the successful bidder may wish to pursue with the special administrators a proposal to ensure that Naluri Bhd has a level of operations that is adequate to warrant continued trading and/or listing of Naluri Bhd to comply with the requirements under Practice Note No 10/2011;

(g) five bids were received by Danaharta for the block of shares. The first defendant through the second defendant was one of the bidders. The second defendant bid for 220.96m shares representing 32% of Naluri Bhd's issued and paid up capital;

(h) the second defendant's bid was declared the winning bid with a bid price of RM1.98 per Naluri share. The total costs of the acquisition amounted to RM437,511,139.56. The second defendant entered into a sale and purchase agreement dated 11 August 2003 with Danaharta for the purchase of the 32% block of the Naluri Bhd's shares;

(i) as part of its bid for the block of shares the second defendant had also submitted to Danaharta together with the tender bid a proposal with regard to the notice from KLSE under Practice No 10/2001. This would also involve a Proposed Assets Acquisition and Proposed SHB Investment. There would be a capital repayment in cash to the shareholders of Naluri Bhd;

(j) at all times, Naluri Bhd, the first and second defendants were advised by their respective merchant bankers. The proposals were approved by the Securities Commission and the Malaysian Securities Exchange Bhd. The approval of the shareholders of the respective parties who were involved or affected by the proposals was duly obtained;

(k) the plaintiff, as a shareholder of the first defendant, did not attend the extraordinary general meeting of the first defendant to approve the transactions. The purchase of the said shares by the second defendant was duly completed on 9 December 2004;

(l) the Securities Commissions had not required the first defendant to make any mandatory take-over offer to all the shareholders of Naluri Bhd. All the transactions have been duly carried out and implemented. The capital repayment was implemented and all the shareholders of Naluri Bhd including the plaintiff had duly received their payment in proportion to the shares held by each of them; and

(m) in a subsequent development, Darul Metro Sdn Bhd, a wholly owned subsidiary of the first defendant had acquired the entire business and

liabilities of Naluri Bhd. Pursuant to the said disposal Naluri Bhd had undertaken a capital reduction and returned RM0.75 per share to its shareholders.

[8] Enclosure 111, the summary of the second defendant's case reads as follows:

(a) the second defendant is a subsidiary of the first defendant which is a public company listed on the Malaysia Securities Exchange Bhd. Pengurusan Danaharta Nasional Berhad was the owner of 44.84% of the issued and paid up capital of Naluri Bhd;

(b) on 23 December 2002 special administrators were appointed over Naluri Bhd;

(c) on 18 April 2003, Naluri Bhd announced that special administrators had decided that it was in the best interest of all stakeholders of Naluri Bhd for it to proceed with a capital repayment of at least RM690,516,320 on the basis of RM1 for each existing share;

(d) on 18 April 2003, Naluri Bhd had also received a notice from the KLSE informing that it was determined as having an inadequate level of operations in accordance with Practice Note No 10/2001 of the KLSE listing requirements. On 21 April 2003, Danaharta advertised for the sale by tender of the 44.84% block of share in Naluri Bhd;

(e) The terms of reference for the sale by tender included the following terms:

(i) interested parties are invited to submit offers to acquire a block of shares representing approximately 44.84% of the issued and paid up capital of Naluri Bhd based on its existing share capital (excluding conversion of any warrants issued by Naluri Bhd and which remain outstanding). The shares currently consist of 309,648,000 ordinary shares of RM1 each in the company. The principal terms and conditions of the sale by tender are contained in terms of reference available from Danaharta;

(ii) on 18 April 2003 Naluri Bhd announced that:

(a) the special administrators have decided that it is in the best interest of all stakeholders of Naluri Bhd for it to proceed with a capital repayment (proposed capital repayment) of at least RM690,516,320 on the basis of RM1 for each existing share in Naluri Bhd; and

(b) Naluri Bhd has received a notice from the KLSE informing that it is determined as having an inadequate level of

operations in accordance with Practice Note No 10/2001 of the KLSE listing requirements.

(iii) a prospective bidder should consider the possible effects of the proposed capital repayment on the share capital of Naluri Bhd (including but not limited to any bonus or other share issue or consolidating, share split, conversion or cancellation of shares) as well as the effects of any conversion of existing warrants issued by Naluri Bhd. Based on Naluri Bhd's unaudited financial statements for the year ended 31 December 2002 announced on 28 February 2003, Naluri Bhd has 138,078,312 outstanding warrants; and

(iv) a prospective bidder should also consider the consequences of the KLSE's classification of Naluri Bhd as an affected listed issuer under Practice Note No 10/2011. Under Practice Note No 10/2001, the KLSE may suspend trading in shares of Naluri Bhd and subsequently de-list the shares of Naluri Bhd from the KLSE if it fails to comply with its obligations prescribed in Practice Note No 10/2011. Given that the successful bidder would be a substantial shareholder of Naluri Bhd, the successful bidder may wish to pursue with the special administrators a proposal to ensure that Naluri Bhd has a level of operations that is adequate to warrant continued trading and/or listing of Naluri Bhd to comply with the requirements under Practice Note No 10/2001;

(f) five bids were received by Danaharta for the block of shares. The first defendant through the second defendant was one of the bidders. The second defendant bid for 220.96m shares representing 32% of Naluri Bhd's issued and paid up capital;

(g) the second defendant's bid was declared the winning bid with a bid price of RM1.98 per Naluri share. The total costs of the acquisition amounted to RM437,511,139.56. The second defendant entered into a sale and purchase agreement dated 11 August 2003 with Danaharta for the purchase of the 32% block of the Naluri Bhd's shares;

(h) as part of its bid for the block of shares the second defendant had also submitted to Danaharta together with the tender bid a proposal with regard to the notice from KLSE under Practice No 10/2001. This would also involve a Proposed Assets Acquisition and Proposed SHB Investment. There would be a capital repayment in cash to the shareholders of Naluri Bhd;

(i) at all times, Naluri Bhd, the first and second defendants were advised by their respective merchant bankers. The proposals were approved by the Securities Commission and the Malaysian Securities Exchange Bhd. The approval of the shareholders of the respective parties who were involved or affected by the proposals was duly obtained;

(j) the plaintiff, as a shareholder of the first defendant, did not attend the extraordinary general meeting of the first defendant to approve the transactions. The purchase of the said shares by the second defendant was duly completed on 9 December 2004;

(k) the Securities Commissions had not required the first defendant to make any mandatory take-over offer to all the shareholders of Naluri Bhd. All the transactions have been duly carried out and implemented. The capital repayment was implemented and all the shareholders of Naluri Bhd including the plaintiff had duly received their payment in proportion to the shares held by each of them; and

(l) in a subsequent development, Darul Metro Sdn Bhd, a wholly owned subsidiary of the first defendant had acquired the entire business and liabilities of Naluri Bhd. Pursuant to the said disposal Naluri Bhd had undertaken a capital reduction and returned RM0.75 per share to its shareholders.

PRELIMINARIES

[9] One witness gave evidence for the plaintiff and one witness for the defendants. The evidence of the plaintiff on relevant issues is based on speculation, surmise, conjecture and hearsay on the role of Danaharta 'acting in concert'.

[10] In the instant case, Danaharta came into possession of 44% shares in consequence of vesting. Danaharta and the special administrators have no personal interest in the subject matter of the shares. Only 32% of the shares were sold to the defendants with the relevant approvals. 'Acting in concert' has a specific meaning under s 33(2) of the Securities Commission Act 1993 ('SCA 1993') as follows:

> For the purpose of this Division, a reference to 'persons acting in concert' shall be construed as a reference to persons who, pursuant to an agreement, arrangement or understanding, co-operate to —
>
> (a) Acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or
>
> (b) Act jointly or severally for the purpose of exercising control over a company.

(It must be noted that in the year 2007 the above provision has been deleted).

[11] By no stretch of imagination can I say that Dananarta or special administrator's presence or conduct will trigger s 33(2) of the SCA 1993. What

SCA 1993 attempts to achieve is that it does not allow any person directly or indirectly to acquire and hold 33% or more of the shares with voting rights. If any person does so he is obliged to make the mandatory offer to arrest de facto control. This was aptly explained by Edgar Joseph Jr SCJ as follows:

> Here, it would be useful to keep in the forefront of our minds, the object of the 'concert party' provisions which counsel for the appellant aptly described as the prevention of the take over of company control by stealth. More particularly, r 34 requires any person or group of persons acting in concert who acquires shares in a company carrying more than 33% of voting rights to make a bid for all the other shares of that company at the highest price paid by the offeror for the shares in the previous 12 months. Such a percentage of the voting power is regarded as control and so the policy of the Code is to require a new controller to give an opportunity to the other shareholders of quitting the company and sharing in the price paid for the control or its consolidation became the character of the company, in a sense, may have changed.

[12] In this respect the plaintiff's evidence which reads as follows:

> It is not in dispute that Danarharta, together with the 2nd Defendant upon its completion of the Naluri Shares SPA altogether owned a total of 44% of the shareholding of Naluri. They therefore jointly controlled over 33% of the voting shares of Naluri. I believe that by itself this fact will trigger the requirement for the Defendants to make a mandatory take-over since Danaharta (through the SAs appointed by Danaharta) clearly had an agreement with the Defendants to enable the Defendants to take control of the Board of Naluri.

does not provide a cause of action as premised by the plaintiff. In my view, the plaintiff's action ought to be dismissed in limine as Danaharta as I said earlier, is a special purpose vehicle with rights and immunities and cannot be a subject matter of speculative attack by the plaintiff in law or fact. However, I have taken the safer approach to deal with other relevant issues.

[13] I have heard the evidence, read the documents, objections and submission of the parties in detail. Learned counsel have placed a comprehensive submission on the law, facts and evidence etc. The court is grateful. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the plaintiff, I take the view that the plaintiff's claim must be dismissed. My reasons, inter alia, are as follows:

(a) learned counsel for the plaintiff asserts that a minority shareholder is entitled to bring an action against a company for breach of statutory duty and claim damages. SCA 1993 and the Code clearly provide for a public law remedy but whether it provides for private law remedy in the nature plaintiff is seeking is not spelt out in the Act. It is trite that the issue public or private law remedy is a matter of statutory interpretation with a view

to ascertain legislative intent. In that sense, the Supreme Court's decision of Petaling Tin Bhd may not be directly applicable. In addition, the cases on this issue on this area of jurisprudence have been difficult to comprehend and the judgment sets out different test. On this issue Lord Denning in *Ex Parte Island Records Ltd & Ors* [1978] Ch 122 said that the issue may well be decided by the toss of a coin. His Lordship had this to say:

> The determination of the question whether a criminal statute also created a civil cause of action has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you might as well toss a coin to decide it. The court should seek for other ways to do 'therein what to justice shall appertain'.

(b) Nallini Pathmanathan J in an illuminating judgment had taken pains to go through the relevant authorities in great detail to demonstrate the difficulty in this area of jurisprudence and on the factual matrix of the case cited as *Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corporation Bhd & Ors* [2012] 7 MLJ 215; [2012] 4 CLJ 401, had held the Act and Code did not confer on the plaintiff a private right of action against the defendants in tort for damages for breach of statutory and, inter alia, made the following observations:

> [42] From the foregoing cases, the guiding principles to be gleaned are that:
>
> (a) as a general rule 'where an Act creates an obligation and enforces the performance in a specified manner… that performance cannot be enforced in any other manner.' (see Lord Tenterden CJ in *Doe d Bishop of Rochester v Bridges* [1831] 1 B & Ad 847);
>
> (b) Lord Diplock in *Lonrho v Shell Petroleum Co* recognised two exceptions to this general rule, the first exception being relevant here, namely where the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals. The second exception relates to a situation where the statute creates a public right, which is not directly relevant in the context of the present case;
>
> (c) the fact that a statute was unquestionably passed for the protection of a specific class of individuals is not conclusive, for example, child protection legislation: see *X (minors) v Bedforshire Country Council* [1995] 3 WLR 152;
>
> (d) where the statute imposes a duty and provides an adequate remedy for its breach of some other means of enforcement, this militates against the existence of an action for breach of statutory duty. Conversely where the statute does not provide a remedy the assumption is that there will be a cause of action for a breach of the duty entitling the person injured to compensation or damages; and
>
> (e) where it seems that breach of the statute is actionable, the circumstances in which the claimant sustains harm must fall within

A the terms of the defendant's statutory duty. Additionally the damage suffered by the claimant must be of the kind that the statute was intended to prevent.

(c) it is trite that the nature of the duty and liability caused by its breach B would depend on the words of statute. The learned authors of Ramaswamy Iyer's '*The Law of Torts*, (10th Ed), Lexis Nexis say:

> A breach of a duty imposed by statute is ordinarily a punishable offence. It may, also be actionable by the express terms of the statute or on the principle C than an action lies for damage resulting from any indictable offence. In an action for breach of a statutory duty the plaintiff must prove: (a) that the statute in question imposes a duty on the defendant; (b) that the duty is towards the plaintiff; (c) that the breach of duty by the defendant was the legal cause of the damage sustained by the plaintiff; and (d) that the damage was D such as was contemplated by the statute. Some enactments create special rights of action.

(d) from the decided cases on this area of law the courts, inter alia, are more sympathetic to provide a private law remedy in respect of social E legislation or its like and against the statutory body for its breach. In the instant case, the plaintiff's claim is not against the statutory body but against the defendants and that too without any complaint to the Securities Commission which has been armed with sufficient armory to ensure due compliance of the Act and the Code;

F (e) in my view, SCA 1993 and the Code appears to allow the Securities Commission to jealously guard and regulate the players without providing any form of private law remedy to the minority shareholders. In this respect, ss 33A(4)–(5) and 33D(1)(a)–(g), (2) and (3) place the entire control with the Securities Commission to do what is just and G equitable inclusive of condoning any breach according to the exigency of the case. The said sections read as follows:

> Section 33A(4)
>
> The Commission shall administer the Code according to the objectives H specified in subsection (5) and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code; and without limiting the generality of the foregoing, may —
>
> (a) issue rulings from time to time, interpreting the Code;
>
> I (b) issue rulings on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and
>
> (c) enquire into any matter relating to any take-over offer, merger or

compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission deems fit with respect thereto.

Section 33A(5)

In making any recommendation under subsections (1) and (2) and in administering the Code and exercising its powers under this Act, the Commission shall take into account the desirability of ensuring that the acquisition of voting shares or control of companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure —

(a) that the shareholders and directors of an offeree and the market for the shares that are the subject of the take-over offer —

(i) are aware of the identity of the acquirer and offeror;

(ii) have reasonable time in which to consider a take-over offer; and

(iii) are supplied with sufficient information necessary to enable them to assess the merits of any take-over offer;

(b) that, so far as practicable, all shareholders of an offeree have equal opportunities to participate in benefits accruing from the take-over offer, including in the premium payable for control;

(c) that fair and equal treatment of all shareholders, in particular, minority shareholders, in relation to the take-over offer, merger or compulsory acquisition would be achieved, and

(d) in its response to, or making recommendations with respect to any take-over offer, merger or compulsory acquisition, the directors of the offeree and acquirer shall act in good faith to observe the objects, and the manner in which they observe the objects, specified in this subsection, and that minority shareholders are not subject to oppression or disadvantaged by the treatment and conduct of the directors of the offeree or the acquirer.

Section 33D(1)(a)–(g)

Where any person who is under an obligation to comply with, observe or give effect to the provisions of the Code or any ruling made under subsection 33A(4), fails to comply with, observe or give effect to any such provision of the Code or ruling (hereinafter referred to as the 'defaulting person'), the Commission may take one or more of the following actions:

(a) direct the defaulting person to comply with, observe or give effect to any such provision of the Code or ruling;

(b) impose a penalty not exceeding two hundred and fifty thousand ringgit on the defaulting person;

(c) reprimand the defaulting person;

(d) direct a stock exchange or deprive the defaulting person access to the facilities of the stock exchange;

(e) where the defaulting person is a listed corporation, direct the stock exchange —

(i) to suspend trading in the securities of the corporation;

(ii) to suspend the listing of the corporation; or

(iii) to remove from the official list the corporation or the class of securities of the corporation;

(f) where the defaulting person is a corporation that is not listed, direct any stock exchange to prohibit the listing of any of its securities; or

(g) direct a stock exchange to prohibit the defaulting person from engaging in transactions to be executed through the use of the facilities of the stock exchange.

Section 33D(2)

The Commission shall give a written notice to a defaulting person of its intention to take action under subsection (1) and shall give the defaulting person an opportunity to be heard prior to it taking any action under subsection (1).

Section 33D(3)

The Court may, in a case where the Commission gives a direction under paragraph (1) (a), on an application by the Commission, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings.

(f) in this respect, I would have thought it will be *sine qua non* for the plaintiff to lodge a complaint with the Securities Commission for any breach before even pursuing any claim whether it is public or private law remedy. The plaintiff's evidence that it will not serve useful purpose to lodge a complaint to the Securities Commission must be frowned upon by court. The court ought not to entertain any application where the complaint has not been placed with the appropriate authority as it will amount to abuse of process of court when a complaint and relief mechanism has been specifically provided for in the Act;

(g) in the instant case, the plaintiff had already filed a suit relating to the acquisition. The plaintiff could have raised the present issues in one suit rather than raising on installment basis in one suit after another. Such conduct must also be treated as an abuse of process court. It only requires RM200 to file an action and the tax payers are forced to absorb the costs of judicial proceeding by the administration of justice. This is a sad state of affairs and to arrest it there should be appropriate guidelines by way of practice direction and/or code of ethics to ensure judicial process is not abused, and tax payers' money is not unnecessarily wasted; and

(h) I am in total agreement with the submission of learned counsel for the defendants that the plaintiff's action must be dismissed.

[14] For reasons stated above, I dismiss the plaintiff's action. The plaintiff to pay the first defendant costs in the sum of RM50,000 and the second defendant costs in the sum of RM30,000. The first and second defendants to pay allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur.

[15] I hereby order so.

Claim dismissed with costs.

Reported by Ashok Kumar